Supreme Court
MAR 15 2010

No. 09-583

In the Supreme Court of the United States

HENRIETTA BROWNING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
HOWARD S. SCHER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether it is *per se* reversible error for a trial court in a discrimination case to decline to give a permissive inference instruction on pretext—*i.e.*, to inform the jury that it may infer that defendants' motives were discriminatory if it finds defendants' explanation of its actions not to be credible—regardless of whether such an instruction is justified by the evidence or whether the absence of such an instruction causes prejudice to the plaintiff.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Cabrera v. *Jakabovitz*, 24 F.3d 372 (2d Cir.), cert. denied, 513 U.S. 876 (1994) 7

Cassino v. *Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987), cert. denied. 484 U.S. 1047 (1988) 5

Conroy v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir.), cert. denied, 543 U.S. 1035 (2004) 7, 11

Fite v. *Digital Equip. Corp.*, 232 F.3d 3 (1st Cir. 2000) ... 7

Gehring v. *Case Corp.*, 43 F.3d 340 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995) 7, 11

Gibson v. *Lockheed Aircraft Serv., Inc.*, 350 U.S. 356 (1956) 6

Kanida v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568 (5th Cir. 2004) 6, 7, 10

Kozlowski v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133 (4th Cir. 2003) 7, 8, 10

McDonough Power Equip., Inc. v. *Greenwood*, 464 U.S. 548 (1984) 10

Moore v. *Robertson Fire Prot. Dist.*, 249 F.3d 786 (8th Cir. 2001) 7, 8, 11

Cases—Continued: Page

Ratliff v. *City of Gainesville*, 256 F.3d 355 (5th Cir. 2001) 10

Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) 4, 5, 6, 8, 9

Rubinstein v. *Administrators of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000), cert. denied, 532 U.S. 937 (2001) 10

Smith v. *Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998) 7

Townsend v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002) 7, 8, 10

Williams v. *Eau Claire Pub. Schs.*, 397 F.3d 441 (6th Cir.), cert. denied, 546 U.S. 836 (2005) 7

Statutes:

28 U.S.C. 2111 10

42 U.S.C. 2000e-16(c) 1

Miscellaneous:

Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* (3d ed. 2008) 8

In the Supreme Court of the United States

No. 09-583

HENRIETTA BROWNING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 567 F.3d 1038.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. A petition for rehearing was denied on August 12, 2009 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on November 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Although petitioner styles her petition as an action against the United States, *et al.*, the only proper party in this Title VII action is the Secretary of the Treasury. See 42 U.S.C. 2000e-16(c). See also note 3, *infra*.

STATEMENT

Petitioner began working at an Internal Revenue Service (IRS) call center in Portland, Oregon in 1989. Pet. App. 2a-3a. In 1998, she was temporarily promoted to the position of team leader; the following year, petitioner's promotion was made permanent. *Id.* at 3a. Art Ayotte became petitioner's supervisor in 2002 when petitioner transferred as a team leader from the night shift to the day shift. *Ibid.* In that job, petitioner was required to monitor a certain number of the calls made by each employee on her team each month, write a detailed critique of each call, and enter the review into a computerized database. *Ibid.* Each team leader was also responsible for a distinct area of tax law and was expected to monitor employees' performance regarding that subject matter. *Ibid.*

In 2003, Ayotte evaluated petitioner's performance and rated her as not having met expectations because she had failed to complete the required number of phone reviews. Pet. App. 3a. Petitioner was placed on a 60-day performance improvement plan (PIP) to address her shortcomings, and she met with Ayotte weekly during those 60 days. *Ibid.* At the conclusion of petitioner's PIP, Ayotte concluded that she still had not completed the required number of phone reviews for employees or submitted the requisite employee security reviews; Ayotte therefore recommended that petitioner be demoted. *Ibid.* Petitioner contested her demotion, but, with the exception of one specification,[2] petitioner's challenge was rejected by the agency. *Id.* at 3a-4a. In 2004,

---

[2] A labor relations specialist agreed that a miscommunication was responsible for petitioner's failure to complete one element of her PIP. Pet. App. 3a-4a.

she was demoted and reassigned to her former position as a taxpayer service specialist. *Ibid.*

In November 2003, after receiving her evaluation, petitioner filed a complaint with the Equal Employment Opportunity (EEO) Office. Her complaint alleged discrimination on the basis of race and retaliation for a prior EEO complaint petitioner had filed against a different supervisor. Pet. App. 4a. The EEO investigation concluded that no discrimination had occurred. *Ibid.*

2. Petitioner then filed this action, alleging race discrimination and retaliation. Pet. App. 4a.[3] At the conclusion of the jury trial, the judge instructed the jury as follows:

> [I]n order to prevail on her first claim for race discrimination, the plaintiff must prove the defendants took certain actions against her and that the plaintiff's race was a motivating factor in the defendants taking the action.
>
> In particular, the plaintiff must prove . . . that her race was a motivating factor in the defendants' conduct. * * *
>
> In order to prevail on her second claim for retaliation, the plaintiff must prove the defendants took certain actions against her because she complained about race discrimination in the workplace. In particular, the plaintiff must prove . . . that her pro-

---

[3] The complaint named as defendants: (1) the United States of America, (2) the Department of the Treasury, (3) the Internal Revenue Service, and (4) John W. Snow, the then-Secretary of the Department of the Treasury. In a Title VII action, only the head of the agency is the proper defendant. See note 1, *supra*.

> tected activity was a motivating factor in the defendants' conduct.

Id. at 7a-8a. The district court defined a "motivating factor" as "a factor that played a role in the decisions" of petitioner's supervisor. *Id.* at 8a. The court also instructed the jury both that it should "weigh and evaluate the testimony and the credibility of each witness," and that it should consider direct and circumstantial evidence (after explaining both concepts). *Ibid.*

Petitioner asked that the following additional instruction be given to the jury, based on this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000):

> Consistent with the general principle of law that a party's dishonesty about a material fact may be considered as affirmative evidence of guilt, if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact.

Pet. App. 4a. The district court declined to give petitioner's requested instruction, explaining that it was "mindful of Ninth Circuit authority that cautions trial judges against giving any kind of inference instruction" as well as of "the risk that an inference instruction can be seen as potentially a comment on the evidence." *Id.* at 3a. However, the court expressly allowed "counsel full latitude to argue inferences, based on a circumstantial evidence instruction." *Ibid.* Thereafter, without contradiction from the court or defense counsel, petitioner's counsel argued to the jury: "if you don't believe the IRS witnesses, then you have the right to find for

[petitioner]." *Ibid.* The jury ultimately found for the defendants. *Id.* at 11a.

3. Petitioner appealed, arguing that the district court's refusal to give her requested "permissive inference instruction" was reversible error.[4] The court of appeals affirmed. Pet. App. 1a-10a. The court recognized this Court's holding in *Reeves* that, in "appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 5a (quoting *Reeves*, 530 U.S. at 147). Reviewing the jury instructions as a whole under an abuse of discretion standard, the court of appeals found no reversible error because the instructions "'set forth the essential elements that [petitioner] had to prove in order to prevail,' and [petitioner] was free to explain those elements to the jury in order to make clear that finding the IRS's proffered reasons for [petitioner's] demotion pretextual could justify the jury['s] finding the IRS had discriminated against [her]." *Id.* at 9a (quoting *Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338, 1345 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988)). The court also noted that petitioner did in fact set forth her pretext argument before the jury—albeit in a cursory fashion—arguing "if you don't believe the IRS witnesses, then you have the right to find for [petitioner]." *Ibid.*

ARGUMENT

Petitioner asks this Court to resolve a conflict among the courts of appeals about whether a plaintiff alleging

---

[4] In her appeal, petitioner also made other arguments, which were disposed of in a separate unpublished opinion affirming the district court's judgment. See Pet. App. 12a-13a. Petitioner did not reassert those arguments in her petition for a writ of certiorari.

discrimination is always entitled to a jury instruction regarding the inference jurors may make if they believe that the defendant's proffered reason for the action in question was pretextual. Further review of this case is not warranted, however, because (1) petitioner's proposed instruction was not a complete and correct statement of the law; (2) petitioner has not argued that the evidentiary predicate existed to enable her jury to draw an inference of discrimination from a finding of pretext; and (3) petitioner does not even attempt to establish that she suffered prejudice as a result of any error the district court may have committed.

1. Petitioner is correct that this Court held in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-148 (2000), that it is permissible for a jury to find intentional discrimination when a plaintiff establishes a prima facie case of discrimination and the jury does not believe the defendant's proffered justification for the action in question. But the decision in *Reeves* addressed substantive issues of proof, not jury instructions. And this Court has never held that a district court must instruct a jury about every legal nuance implicated in a case as long as the instructions it does give are complete and correct. Cf. *Gibson* v. *Lockheed Aircraft Serv., Inc.*, 350 U.S. 356, 357 (1956) (per curiam).

Although the courts of appeals are divided about whether it is error for a district court to decline to issue an inference instruction regarding pretext when a plaintiff requests one,[5] the courts do agree about what such

---

[5] The Second, Third, Fourth, Fifth, and Tenth Circuits have found that a district court should give a permissive inference instruction where sufficient evidence has been presented to raise a likelihood that the jury will disbelieve the nondiscriminatory justification offered by a defendant. *Kanida* v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568, 573-577

an instruction should say if given. A proper inference instruction should inform the jury that it is permitted, *but not required*, to infer discrimination or retaliation if it disbelieves a defendant's proffered justification for taking the action in question. See *Williams* v. *Eau Claire Pub. Schs.*, 397 F.3d 441, 445-446 (6th Cir.), cert. denied, 546 U.S. 836 (2005); *Conroy* v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1228, 1235 (11th Cir.), cert. denied, 543 U.S. 1035 (2004); *Kanida* v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004); *Kozlowski* v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133, 144 (4th Cir. 2003); *Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Smith* v. *Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998); *Gehring* v. *Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 382 (2d Cir.), cert. denied, 513 U.S. 876 (1994). However, in this case petitioner did not request such an instruction. Instead, she asked the court to instruct the jury only that it may draw such an inference—leaving

---

(5th Cir. 2004); *Kozlowski* v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133, 142-145 (4th Cir. 2003); *Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Smith* v. *Borough of Wilkinsburg*, 147 F.3d 272, 278-281 (3d Cir. 1998); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 382-383 (2d Cir.), cert. denied, 513 U.S. 876 (1994). In contrast, in addition to the Ninth Circuit below, Pet. App. 9a-10a, the First, Sixth, Seventh, Eighth, and Eleventh Circuits have found that it is not error for a district court to decline to include such an instruction. *Williams* v. *Eau Claire Pub. Schs.*, 397 F.3d 441, 445-446 (6th Cir.), cert. denied, 546 U.S. 836 (2005); *Conroy* v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233 (11th Cir.), cert. denied, 543 U.S. 1035 (2004); *Moore* v. *Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-790 (8th Cir. 2001); *Fite* v. *Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000); *Gehring* v. *Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995).

out altogether the language about jurors' not being "required" to draw such an inference. See Pet. App. 4a ("[I[f you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact."). It is not an abuse of discretion for a district court to decline to include such a one-sided instruction. See 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2552, at 22-27 (3d ed. 2008).

2. In any case, even if petitioner had requested a properly worded inference instruction, the courts of appeals are apparently in full agreement that such an instruction is appropriate only when the plaintiff has established a prima facie case and there is a sufficient evidentiary basis for a jury to disbelieve the defendant's nondiscriminatory justification. See *Kozlowski*, 77 Fed. Appx. at 144 (district courts should give inference instruction "when the evidence presented at trial creates some likelihood that the jury might disbelieve the legitimate non-discriminatory reasons given by the employer to justify its actions"); *Townsend*, 294 F.3d at 1241 ("We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.'") (quoting *Reeves*, 530 U.S. at 147); *Moore* v. *Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-790 (8th Cir. 2001) (finding no abuse of discretion in declining to include inference instruction where the plaintiff "introduced scant evidence of pretext"). Indeed, the *Reeves* decision itself noted that a trier of fact could "infer from the falsity of the explanation that

the employer is dissembling to cover up a discriminatory purpose" only "[i]n appropriate circumstances." 530 U.S. at 147.

Petitioner makes no effort before this Court to argue that there was a sufficient evidentiary predicate to justify the district court's including an inference instruction. Indeed, she cites no evidence of pretext whatsoever in her petition for a writ of certiorari, and does not even assert that a reasonable factfinder could have found that Ayotte's proffered justification for her demotion—her poor performance—was a pretext for racial discrimination or retaliation. On the contrary, Ayotte consistently stated that he admonished petitioner for her poor performance and ultimately recommended her reduction in grade because she failed to complete her work in a timely fashion and failed to respond to his inquiries. C.A. Supp. E.R. (SER) 342-343, 346-350, 401; see also SER 408-409, 570 (testimony and video deposition of labor relations specialist Phia Williams). He explained that, for Fiscal Year 2003, petitioner did not complete several of the required paper, security, and schedule reviews. SER 393-394. Moreover, although he agreed that petitioner did complete her phone monitoring requirements in that fiscal year, he testified that she did so only after repeated reminders from him. SER 393. In the court of appeals (though not in her petition for a writ of certiorari), petitioner argued that the jury had a reasonable basis to disbelieve Ayotte's testimony because the non-supervisory quality-assurance worker assigned to assist petitioner in cleaning up her computer and organizing her files found that petitioner was responsive to his own suggestions. See Pet. C.A. Br. 46. But the fact that petitioner may have been responsive to a co-worker's suggestions does not raise an inference

that Ayotte was dishonest in claiming that petitioner was not responsive to his. Nor does such evidence call into question the Ayotte's testimony that petitioner failed to complete various job requirements. Ayotte's concerns regarding petitioner's performance were well documented and thoroughly reviewed, see SER 316, 346-359, 566, and confirmed by labor relations specialist Phia Williams, see SER 408-409. See generally Gov't. C.A. Br. 10-12.

3. Finally, even if it were error for the district court to decline petitioner's proposed instruction, such an error would warrant reversal of the jury's verdict only if the error "affect[ed]" petitioner's "substantial rights." 28 U.S.C. 2111; *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-554 (1984). Even courts of appeals that have held that it is error for a district court to decline to give an inference instruction when warranted by the evidence have held that such an error is subject to harmless error review. See *Kozlowski*, 77 Fed. Appx. at 144; *Townsend*, 294 F.3d at 1241-1242; *Ratliff* v. *City of Gainesville*, 256 F.3d 355, 359 (5th Cir. 2001) ("Even if an instruction erroneously states the applicable law or provides insufficient guidance, this Court will not disturb the judgment unless the error could have affected the outcome of the trial.") (quoting *Rubinstein* v. *Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 404 (5th Cir. 2000), cert. denied, 532 U.S. 937 (2001); see also *Kanida*, 363 F.3d at 578-579 (error in declining to give inference instruction was not reversible error because plaintiff was "not seriously impaired in presenting her claim").

Petitioner makes no effort in her petition for a writ of certiorari to establish that the district court's failure to include an inference instruction affected her substan-

tial rights. Nor could she. As discussed at pp. 8-10, *supra*, petitioner did not establish an evidentiary predicate that would have justified the instruction she requested. In addition, the district court properly instructed the jury about the elements petitioner was required to demonstrate to prove discrimination or retaliation. SER 452-456. The court also instructed the jury that it should consider "indirect evidence[,] that is the proof of one or more facts from which you could find another fact." SER 451-452. Finally, the district court expressly informed petitioner's counsel that he could argue to the jury that it could infer discrimination if it disbelieved the IRS's proffered justification for petitioner's demotion, and petitioner's counsel did so, arguing that the jury had "the right to find for" petitioner if it didn't believe the IRS's witnesses. See Pet. App. 9a. Courts have consistently found that the ability of a plaintiff's attorney to argue to the jury about the inferences it may draw if it disbelieves the defendant's proffered justification mitigates any prejudice a plaintiff might suffer from a court's declining to give an inference instruction. See *Kanida*, 363 F.3d at 579 (petitioner was free to argue "that the jury should infer actual discrimination based upon the evidence she presented in [the] case showing pretext on the part of" the defendant); see also *Conroy*, 375 F.3d at 1235 (noting that plaintiff's counsel "made good use of his opportunity to argue pretext to the jury in closing statements"); *Moore*, 249 F.3d at 791 ("[A]lthough the District Court elected not to submit a pretext instruction, it in no way prevented [plaintiff] from presenting his pretext arguments to the jury. * * * Therefore, even if there were instructional error, [plaintiff] incurred no prejudice."); *Gehring*, 43 F.3d at 343 ("Many an inference is permissible. Rather than de-

scribing each, the judge may and usually should leave the subject to the argument of counsel.").

Petitioner's counsel was permitted just such an opportunity, and made use of it. Petitioner cannot identify any possibility that the verdict in her case might have come out in her favor if the district court had included either the instruction she requested or a properly worded inference instruction.

Because petitioner cannot show that she suffered prejudice as a result of the district court's declining to give her requested inference instruction, the outcome of her case would not be affected by this Court's resolution of the disagreement among the courts of appeals, even if this Court were to resolve that disagreement in the manner petitioner suggests. This case does not, therefore, warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
HOWARD S. SCHER
Attorneys

MARCH 2010

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 30 2009
OFFICE OF THE CLERK

No. 09-583

In The
Supreme Court of the United States

HENRIETTA BROWNING,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

BETH CREIGHTON
ZAN TEWKSBURY
STEENSON, SCHUMANN, TEWKSBURY, CREIGHTON & ROSE, P.C.
500 Yamhill Plaza Building
815 Second Avenue
Portland, OR 97204
(503) 221-1792

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED 1

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Carter v. Kentucky, 450 U.S. 288 (1981) 9

Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228 (11th Cir. 2004) 3

Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1994) 2, 3, 9

Ratliff v. City of Gainesville, 256 F.3d 355 (5th Cir. 2001) 2, 3, 8

Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998) 2

Starr v. United States, 153 U.S. 614 (1894) 10

Taylor v. Kentucky, 436 U.S. 478 (1978) 9

Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002) 8

BRIEFS:

Appellees' Answering Brief, *Browning v. United States of America*, No. 07-35557 (9th Cir.) 7

Brief of Appellant, *Smith v. Borough of Wilkinsburg*, No. 97-3133 (3d Cir.) 2

Initial Brief of Plaintiff-Appellant, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.) 3

TABLE OF AUTHORITIES – Continued

Page

Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae, Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.) 6, 7

Brief of the Equal Employment Opportunity Commission as *Amicus Curiae, Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.) 3

OTHER AUTHORITIES:

Model Jury Instruction (Criminal) 4.3 5

Model Jury Instruction (Criminal) 4.6 5

Model Jury Instruction (Criminal) 5.1 5

THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The government acknowledges the existence of a well-established inter-circuit conflict regarding the question presented. (Br. Opp. 6 ("the courts of appeals are divided about whether it is error for a district court to decline to issue an inference instruction"), 6-7 n.5 (contrasting rule in the Second, Third, Fourth, Fifth and Tenth Circuits with rule in the First, Sixth, Seventh, Eighth and Eleventh Circuits), 12 (noting "disagreement among the courts of appeals")). Respondents argue only that the instant case does not present an appropriate vehicle for resolving that question.

(1) The requested jury instruction in this case stated that

> if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you *may* infer a discriminatory or retaliatory motive from that fact.

(Pet. App. 4a) (emphasis added). Respondents assert that this requested instruction was not "a complete and correct statement of the law." (Br. Opp. 6). The government argues that the instruction was defective because, although it properly used the permissive term "may" (rather than "must"), it failed to also contain "language about jurors' not being 'required' to draw such an inference." (Br. Opp. 8). In the proceedings below the government never objected to the instruction on this basis.

The language of proposed instruction is typical of the instructions commonly requested, and in several circuits held mandatory, regarding inferences of discrimination. In *Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001), the Fifth Circuit overturned a jury verdict because the trial judge had refused to give the following instruction.

> If the Plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you *may* presume that the employer was motivated by age discrimination.

256 F.3d at 359 (emphasis added). In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998), the improperly denied instruction was similar.

> If you find that the Defendant employer's reasons for non-renewal of Plaintiff's employment are false or not credible, you *may* infer that discrimination was the real reason and you *may* find for plaintiff.

(Brief of Appellant, *Smith v. Borough of Wilkinsburg*, No. 97-3133 (3d Cir.) at 13, available at 1997 WL 33552033) (emphasis added). Even the circuits which have refused to require a permissive inference instruction have approved the form of instruction requested in this case.[1] None of these instructions

---

[1] In *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994), the court commented,

> Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the

(Continued on following page)

included the special admonition now advocated by the government.

It is not the case, as the government suggests, that all circuits "agree" that a permissive inference instruction is improper unless it includes an express admonition that an inference of discrimination is "not required." (Br. Opp. 6-7). The decisions described in the previous paragraph are all to the contrary. The government is unable to identify a single case in which a proposed jury instruction was ever disapproved, or even challenged, because it lacked the admonition now urged by respondent. In *Ratliff* the EEOC expressly approved the form of the instruction proposed by the plaintiff in that case.[2]

> employer's explanation for its decisions, it *may* infer that the employer is trying to cover up age discrimination. This is a correct statement of the law....

43 F.3d at 343 (emphasis added).

In *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1235 (11th Cir. 2004), the Court "acknowledge[d] that Conroy's pretext instruction is ... a correct statement of law." That proposed instruction stated that "[d]isbelief of the defendant's explanation *may* be enough to infer discrimination or retaliation." (Initial Brief of Plaintiff-Appellant, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.) at 9 (emphasis added), available at 2003 WL 23739368.)

[2] Brief of the Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.) at 14 ("Ratliff's proposed jury instruction accurately states an important principle of proof in disparate treatment cases").

In the proceedings below the United States never objected on this ground to the instruction requested by petitioner. Respondents' new objection is not limited to the circumstances of this particular case, but attacks the correctness of the most common form of permissive inference instruction. If the government believes that the permissive inference instructions now in use are improper without an express warning that an inference of discrimination is "not required," this case is an excellent vehicle for resolving that objection.

The type of instruction requested in this and other cases is correct even without the additional language now urged by the government. The plain meaning of the word "may" is itself clearly permissive; the jurors would of course understand that an inference they "may" draw was not an inference they were required to make. The jury instructions that were actually given in this case included several instructions regarding what the jury "may" do,[3] language which was clearly different from other instructions from the court delineating things the jury "must" or "should" do.[4] The government did not object to any of these instructions using the term "may," even though none of them included the additional (and redundant) admonition that the jury was "not required" to do any of the permitted things. If a

---

[3] Tr. 602, 603.

[4] E.g., tr. 602, 604.

similarly worded requested permissive inference instruction had been given, the jury would assuredly have understood that it was not required to draw the permitted inference.

The United States suggests that any instruction using the term "may" would be improperly "one-sided" if it lacked an express admonition that the inference or other jury action is "not required." (Br. Opp. 8). The principle suggested by this argument would wreak havoc with the jury instructions in use throughout the federal district courts; jury instructions given in most if not all civil and criminal trials use the word "may" without the additional "not required" admonition now insisted upon by respondents. In the Ninth Circuit, for example, there are a number of Model Jury Instructions for criminal cases that utilize the term "may" (without any "not required" caveat) in instructions favorable to the prosecution.[5] The United States cannot seriously be suggesting that district judges should now refuse to

---

[5] For example, Model Jury Instruction (Criminal) 4.3 states:

> You have heard evidence of other [crimes] ... engaged in by the defendant. You *may* consider that evidence ... as it bears on the defendant's [*e.g.*, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident]....

(Emphasis added; see Model Jury Instruction (Criminal) 4.6 (jury "may" consider criminal record in deciding believability of witness); Model Jury Instruction (Criminal) 5.1 (defendant "may" be convicted of aiding and abetting even though he did not personally commit the crime)).

give such common instructions on the ground that they are "one-sided."

(2) The government asserts that the petition failed to contend that the denial of the requested instruction was in any way prejudicial. (Br. Opp. 10). That is not correct. The petition argued at length that

> in the absence of [the requested] instruction juries are likely to ... mistakenly assum[e] that something more than proof of the falsity of an employer's explanation is required to support an inference of discrimination.

(Pet. 21; see Pet. 21-30). The petition specifically contended that "this problem can be avoided only by an instruction from the court, not by mere argument of counsel." (Pet. 25). In the absence of such an instruction, we urged, there would be no way to know whether the jury might have erroneously returned a verdict for the defendant because

> the jury disbelieved the defendant's explanation but concluded, incorrectly, that such a disbelief was not enough to sustain [the plaintiff's] burden of proving ... discrimination.

(Pet. 28) (quoting Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *24-*25). The EEOC insists that "[c]ounsel's arguments are not

an adequate substitute for a complete and accurate statement of the law by the judge."[6]

The government in this case takes a contrary view, expressly disagreeing with the position of the EEOC. The United States contends that, at the least, a jury need not be given a permissive inference instruction so long as the trial judge allows counsel for plaintiff to attempt to persuade the jury that the falsity of a defendant's explanation is the type of evidence which could warrant an inference of discrimination. In the court below the government argued that judges should never give a permissive inference instruction, and ought instead require counsel to raise the issue in closing argument.[7]

The contention advanced by respondents is not a case-specific harmless error argument; rather, it goes to the heart of the conflict among the courts of appeals. A central issue which divides the circuits is whether mere argument of counsel can be a sufficient substitute for, or is preferable to, an authoritative statement of the law from the trial judge.

---

[6] Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae*, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *24-*25.

[7] "Permissive inferences should be left to counsel to argue and should not become the responsibility of the trial court." Appellees' Answering Brief, *Browning v. United States of America*, No. 07-35557 (9th Cir.) at 37, available at 2007 WL 4755536.

Respondents assert that lower courts have "consistently" agreed that a *Reeves* jury instruction is unnecessary so long as counsel for the plaintiff is simply permitted to argue to the jury that the falsity of a defendant's explanation is the type of evidence that would warrant an inference of discrimination. (Br. Opp. 11). That is not correct. The Tenth Circuit, for example, insists that a jury instruction is required precisely because argument of counsel is insufficient.

> The dissent relies considerably on the arguments of counsel to take the place of instructions by the judge on this issue. However, the issue is not the mere fact that an inference of discrimination is possible. Rather, the permissibility of an inference of discrimination from pretext alone is a matter of law.... While counsel may be relied on to ... suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. That is particularly true where, as here, the law goes to the heart of the matter.... It is unreasonable, we think, to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefits of such arguments.

Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 n.5 (10th Cir. 2002); see *Ratliff v. City of Gainesville*, 256 F.3d 355, 361 n.7 (5th Cir. 2001) ("jurors ... need some instruction in the permissibility of drawing th[e] inference").

The circuits which refuse to require a permissive inference instruction, on the other hand, agree with the government's contention that arguments of counsel are an adequate substitute for a jury instruction regarding this area of the law. (Br. Opp. 11). Indeed, the Eighth Circuit goes even further, holding that argument of counsel is preferable to a jury instruction. "[T]he judge may and usually should leave the subject to the argument of counsel." *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). The brief in opposition argument highlights the conflict on this pivotal issue. The circumstances of the instant appeal are typical of the cases in which this issue arises; in no instance to our knowledge has a trial judge forbidden counsel for plaintiff to argue to the jury that the falsity of a defendant's evidence would warrant an inference of discrimination. In this regard as well the instant case is an excellent vehicle for resolving the question presented.

The court below erred in holding that argument of counsel renders unnecessary an otherwise mandatory jury instruction. (App. 10a). This Court has repeatedly noted that where an otherwise mandatory instruction has been denied, "arguments of counsel cannot substitute for instructions by the court." *Carter v. Kentucky*, 450 U.S. 288, 303 (1981) (argument of defense counsel no substitute for instruction on presumption of innocence); *Taylor v. Kentucky*, 436 U.S. 478, 420 (1978) (argument of counsel no substitute for instruction that inference of guilt may not be drawn from failure of defendant to testify in criminal case).

"[U]nder any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and ... his lightest word or intimation is received with great deference." *Starr v. United States*, 153 U.S. 614, 626 (1894). The argument of counsel cannot have the same effect. The government notes that in this case – as in most if not all cases – plaintiff's counsel was permitted to "argue" to the jury that proof of the falsity of a defendant's explanation is the type of evidence that would permit an inference (Br. Opp. 10-11); unlike an instruction from the court, however, such an argument of counsel was not a view that the jury was obligated to accept.

(3) The brief in opposition raises for the first time a new objection to the disputed instruction. The requested instruction was unwarranted in this case, the government now argues, because there was insufficient evidence that the defendant's explanations were untrue. (Br. Opp. 8-11). This fact-bound contention was not advanced in the lower courts and cannot be raised at the eleventh hour in this Court as a reason to deny review.

In the court of appeals petitioner emphatically argued in support of the disputed instruction that "[t]here was ample evidence at trial that defendants' explanations ... were not worthy of credence."[8]

---

[8] Plaintiff-Appellant's Opening Brief at 45.

> There was ample evidence from which the jury could have found the shifting and inconsistent reasons given for taking action against Browning were unworthy of credence. There was evidence that Browning did not have the performance deficiencies defendants claimed.[9]

Petitioner's appellate brief included a lengthy and detailed summary of the evidence substantiating her contention that the defendant's "grounds for her demotion were false."[10] In the Ninth Circuit the government conspicuously did not dispute either petitioner's summary of that record evidence or her assertion that that evidence was entirely sufficient to support a jury finding that the proffered explanations were untrue. Similarly, in opposing the requested instruction in the trial court, the government never denied that there was sufficient evidence to warrant a jury finding that the defendant's explanations were untrue.

In this Court, however, the government objects that the petition was defective because it did not reiterate the same summary and characterization of the record which petitioner had made, and which the government had not disputed, in the Ninth Circuit. To the contrary, the framing of the petition was entirely appropriate. The petition contains no "argu[ment] that there was a sufficient evidentiary predicate to

---

[9] *Id.* at 45-46.

[10] *Id.* at 14; see *id.* at 6-15, 44-47.

justify the district court's including an inference instruction" (Br. Opp. 9) because in the courts below the government had not disputed the existence of that predicate. The petition does not describe the "evidence of pretext" (Br. Opp. 9) because in the court below the government had not disputed the sufficiency of that evidence.

The contents of certiorari petitions would be substantially and pointlessly complicated if petitioners were required to address, and to detail the evidence related to, issues that clearly were not in dispute in the lower courts. The United States would undoubtedly and properly object if its own petitions were on that basis treated as defective. In the instant case petitioner had no reason to anticipate that the government in this Court would change its position and for the first time in the litigation contend that there was insufficient evidence to support a jury finding that its proffered explanations were untrue.

The government suggests that the evidence at trial "did not establish an evidentiary predicate that would have justified the instruction [petitioner] requested." (Br. Opp. 11). Having failed in either the district court or the court of appeals to raise that objection to the proposed jury instruction, however, respondent cannot rely on this argument for the first time in this Court. Had the government chosen to advance this contention in the lower courts, those courts would have been in a position to address that possible justification for the denial of the disputed instruction. The government cannot deliberately

decline to raise such an issue in the lower courts and then oppose review on the ground that its own inaction has resulted in an unresolved fact-bound dispute.

There is, moreover, ample record evidence in this case to support a jury finding that the defendants' explanations for demoting petitioner were false. The trial judge concluded that there was sufficient evidence of pretext to support a jury verdict.[11] The varying justifications asserted by respondents' witnesses for the demotion of the petitioner were repeatedly contradicted by the testimony of petitioner and others. There was also substantial evidence that respondents had taken no action against employees who had the very performance deficiencies with which petitioner was charged. There is no realistic possibility that the lower courts on remand would find plaintiff's evidence insufficient. As a practical matter a resolution of the question presented in favor of petitioner is essentially certain to result in the new trial which petitioner seeks.

---

[11] Tr. 578 ("a rational juror could conclude that the plaintiff's race was a motivating factor in ... her having been ... demoted").

CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

BETH CREIGHTON
ZAN TEWKSBURY
STEENSON, SCHUMANN,
TEWKSBURY, CREIGHTON
& ROSE, P.C.
500 Yamhill Plaza Building
815 Second Avenue
Portland, OR 97204
(503) 221-1792

Attorneys for Petitioner

**Counsel of Record*